United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-2064

Argued by
MARTIN I. SAPERSTEIN

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA, *ex rel.*
JOSEPH A. MERCOGLIANO,

Petitioner-Appellant,

against

COUNTY COURT OF NASSAU COUNTY,

Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

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BRIEF FOR RESPONDENT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

B. New York Statutes:

C. Federal Statutes:

D. Other Authorities:

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

This is an appeal from an order entered June 7, 1976 by the Honorable Thomas C. Platt, United States District Judge of the Eastern District of New York, dismissing petitioner's petition for a writ of habeas corpus. A certificate of probable cause was issued by the District Court on June 16th, 1976. A notice of appeal was served on June 23, 1976.

The writ was directed to a judgment of the County Court of Nassau County (Samenga, J.), rendered on April 4, 1975 convicting the petitioner, upon his plea of guilty, of attempted criminal sale of a controlled substance (marijuana) in the sixth degree and sentencing him to an indeterminate term of imprisonment of one and a half years to three years.

The petitioner has not commenced service of the term of imprisonment, and is on bail pendente lite.

The District Court's order and opinion are unreported and are reproduced at pages A-1 through A-11 of the petitioner's appendix.

Issue Presented

Whether petitioner's conviction in another jurisdiction of an offense that would not have been denominated a felony under New York's penal law but for which, in accord with New York's definition of a felony, a sentence of a term of imprisonment in excess of one year was authorized, may constitutionally serve as a predicate for a second felony offender sentence pursuant to New York Penal Law former §70.06(1)(a) and (b)(i), Laws of New York, 1973 Ch. 227 §9.

Statement of the Case

The Indictment

On November 7, 1974, petitioner was indicted by a Nassau County Grand Jury and charged with Criminal Sale of a Controlled Substance (marihuana) in the Fifth Degree (class C felony), Criminal Possession of a Con-

trolled Substance in the Sixth Degree (class D felony), Criminal Possession of a Controlled Substance in the Seventh Degree (class A Misdemeanor).

Guilty Plea

On January 21, 1975, petitioner was permitted to plead guilty to attempted criminal sale of a controlled substance (marijuana) in the sixth degree, a class E felony, in satisfaction of the indictment (Minutes of Change of Plea, p. 15). The petitioner was advised by the County Court of his possible status as a prior felony offender, which would necessitate a minimum sentence of imprisonment (*Id.* pp. 4, 6, 10, 11).

Sentence

On April 4, 1975, petitioner appeared in the Nassau County Court for sentencing. Petitioner admitted to the court having a 1972 felony conviction in Texas for the possession of marihuana (Minutes of Sentence p. 5). Defense counsel then informed the court that petitioner's 1972 felony conviction in Texas for the possession of the two marihuana cigarettes would have been a misdemeanor in New York in 1972 and was now a misdemeanor in Texas also (*Id.* p. 5). The court sentenced petitioner as a prior felony offender to an indeterminate term of imprisonment of one and a half years to three years.

Appellate History

Petitioner's judgment of conviction was affirmed by the Appellate Division of the Supreme Court for the Second Judicial Department on January 6, 1976. *People* v. *Mercogliano,* 58 A.D.2d 907 (1976), *lv. to app. denied* 38 N.Y.2d 946 (1976).

Applicable Laws of New York

Penal Law §10.00 (5):

"(5) 'Felony' means an offense for which a sentence to a term of imprisonment in excess of one year may be imposed."

Penal Law §70.06 per Laws of New York, 1973, Ch. 277 §9

"1. Definition of second felony offender

(a) A second felony offender is a person who stands convicted of a felony defined in this chapter, other than a class A felony, after having previously been subjected to one or more predicate felony convictions as defined in paragraph (b) of this subdivision.

(b) For the purpose of determining whether a prior conviction is a predicate felony conviction the following criteria shall apply:

(i) the conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized irrespective of whether such sentence was imposed;*

* * *

(iv) Except as provided in subparagraph (v) of this paragraph, sentence must have been imposed not

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* Effective August 9, 1975 (Laws of New York, 1975, Ch. 784 §1), subparagraph (i) was prospectively amended to read:

"(i) The conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and could be authorized in this state irrespective of whether such sentence was imposed;"

more than ten years before commission of the felony of which the defendant presently stands convicted;

(v) In calculating the ten year period under subparagraph (iv), any period of time during which the person was incarcerated for any reason between the time of commission of the previous felony and the time of commission of the present felony shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration;

* * *

Penal Law §70.10

1. Definition of persistent felony offender.

(a) A persistent felony offender is a person who stands convicted of a felony after having previously been convicted of two or more felonies, as provided in paragraphs (b) and (c) of this subdivision.

(b) A previous felony conviction within the meaning of paragraph (a) of this subdivision is a conviction of a felony in this state, or of a crime in any other jurisdiction, provided:

(i) that a sentence to a term of imprisonment in excess of one year, or a sentence to death was imposed therefor; and

* * *"

ARGUMENT

Petitioner's New York sentence, as a second felony offender, was constitutional.

On appeal, petitioner claims that New York Penal Law former §70.06 (b) (i), Laws of New York, 1973, ch. 277 §9, denied him the equal protection of law insofar as it permitted, as a predicate for New York's former second felony offender statute, the conviction of a felony in New

York, or, of an offense in another jurisdiction "for which a sentence of a term of imprisonment in excess of one year * * * was authorized irrespective of whether such sentence was imposed." Petitioner would require that the offense in the jurisdiction outside New York be a felony if it had been committed in New York, arguing that only then would he be equal for second felony offender treatment with an offender whose predicate was in fact a conviction of a felony in New York. Petitioner is wrong and the statute accordingly is constitutional.*

Initially, we must determine the equal protection standard here applicable. In its opinion the District Court stated

* The New York appellate courts have split on the constitutionality of the statute here in issue. The Appellate Division, First Judicial Department, in *People* v. *Wright,* 50 A.D.2d 730, and the Appellate Division, Second Judicial Department, in the instant case and initially in *People* v. *Darson,* 48 A.D.2d 931, have declared the statute constitutional. The Appellate Division, Third Judicial Department, in *People* v. *Morton,* 48 A.D.2d 58, and *People* v. *Parker,* 49 A.D.2d 657, declared the statute unconstitutional.

The issue is presently pending before the Appellate Division, Fourth Judicial Department in *People* v. *Slepinski,* and before the New York Court of Appeals in *People* v. *Parker, supra,* argued October 14, 1976.

In the instant case Judge Jacob Fuchsberg, Associate Judge of the New York Court of Appeals, denied Mercogliano leave to appeal to the Court of Appeals, adding "with leave to review in view of the pendency of *People* v. *Mary Ann Parker," supra.* (Certificate Denying Leave, petitioner's appendix p. A-37.) Whether Judge Fuchsberg's caveat would in fact permit him subsequently to grant leave to appeal to the Court of Appeals, is at the least arguable under *People* v. *Welcome,* 37 N.Y.2d 811 (1975). In any event, as respondent ultimately agreed in the District Court, although petitioner might obtain relief in the New York Courts subsequent to a decision in *Parker* favorable to his position, either through Judge Fuchsberg's caveat or more likely through New York's Criminal Procedure Law §440.20 ("Motion to set aside sentence; by defendant"), he has at this point in time exhausted his state remedies.

In view of the impending decision of the New York Court of Appeals in *Parker,* this Court, however, may abstain pending construction of the statute here in issue by the New York Court of Appeals. *See Bellotti* v. *Baird,* —— U.S. ——, 96 S.Ct. 2857 (1976).

that both parties agreed that the "rational basis" and "relevance to the purpose for which the classification was made" tests [*Marshall* v. *United States,* 414 U.S. 417, 422 (1974)], are the applicable equal protection standards in determining the constitutionality of the statute in issue. On appeal petitioner shifts base and argues that the "strict scrutiny" test should be applied, citing *People ex rel. Wayburn* v. *Schupf,* 39 N.Y.2d 682 (1976); *Bolling* v. *Mason,* 345 F.Supp. 48 (D.C. Conn. 1972), and claiming the statute affects a "fundamental right or interest." However, petitioner's initial position in the District Court was correct.

Not every important constitutional right rises to the level of a fundamental right. *Keker* v. *Procunier,* 398 F.Supp. 756, 762 (E.D. Cal. 1975). And fundamental rights are for the most part first amendment rights. *United States* v. *Kras,* 409 U.S. 434, 446 (1973). Manifestly, as the Supreme Court in *Marshall* v. *United States, supra,* pages 421-422, has held, there is no fundamental right or interest to liberty after conviction for a serious crime, particularly here where petitioner was at the least eligible for a term of imprisonment as a first felony offender. It is for that reason that penal classifications have been uniformly subjected to the rational basis test. *E.g., Marshall* v. *United States, supra; Johnson* v. *Louisiana,* 406 U.S. 356, 363 (1972); *Baxstrom* v. *Herold,* 383 U.S. 107 (1966); *United States* v. *Brookins,* 383 F.Supp. 1214, 1216 (D.N.J. 1974); *Duff* v. *Wells,* 201 F.2d 503 (9th Cir. 1953), *cert. denied* 346 U.S. 861 (1953); *United States* v. *Russell,* 285 F.Supp. 765 (E.D. Pa. 1968), *aff'd.,* 406 F.2d 774 (3rd Cir. 1969).

Petitioner's reliance on *People ex rel. Wayburn* v. *Schupf, supra,* and *Bolling* v. *Mason, supra,* is misplaced.

In *Wayburn,* the Court of Appeals applied the strict scrutiny equal protection test to a state statute involving *pretrial* detention of juveniles. That an individual who was merely accused of a crime has a fundamental interest in liberty is undisputed; however, as courts have uniformly held, that right or interest no longer exists for one, like petitioner, who stands convicted of a serious crime which carries a term of imprisonment. *Bolling,* in short, appears to have been effectively overruled by *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1973) where the Supreme Court in essence rejected the strict scrutiny test for review of "good time" laws.

On the merits, therefore, equal protection is not here violated if there is "some 'rational basis' for the statutory distinctions made," or "they 'have some relevance to the purpose for which the classification is made.' " *Marshall* v. *United States, supra,* at 422 (1974).

Initially, the statute in question provided a uniform criteria for determining whether a prior judgment of conviction qualified as a predicate for New York's former second felony offender statute.

New York's Penal Law §10.00(5) defines a "felony," within the meaning of its penal law, as "an offense for which a sentence to a term of imprisonment in excess of one year may be imposed"—a long-standing definition in New York. *People* v. *Erickson,* 302 N.Y. 461, 466 (1951); *People* v. *Bellinger,* 269 N.Y. 265 (1935); *People ex rel. Cosgriff* v. *Craig,* 195 N.Y. 190, 196 (1909). The statute in issue provided that the predicate offense committed in another jurisdiction be one for which a sentence to a term

of imprisonment in excess of one year might have been imposed. Thus, keeping in mind that the second felony offender statute was designed to increase the period of confinement for the most serious criminal offenders, the statute in issue established a simple and uniform criteria to identify such offenders; *i.e.,* whether the offender had previously been convicted of a felony in any jurisdiction—the term "felony" being uniformly defined, through a combination of Penal Law §10.00(5) and the statute in question, as an offense for which a sentence to a term of imprisonment in excess of one year may be imposed. There is thus no inequality between New York offenders and offenders in another jurisdiction in the criteria that exist to identify among them the most serious offenders deserving extended terms.*

Without doubt the application of the unform length of sentence criteria in determining who is a second felony offender will result in instances where the offender will be declared a second felony offender albeit the crime com-

* There is nothing unique in New York's definition of "felony." Congress has chosen to define "felony" in the same manner, 18 U.S.C. §1.

And the statute in question is similar to a federal statute enacted in 1970, which in providing for increased punishment in certain cases, defines a "special offender", in part, as one who has "previously been convicted in courts of the United States [or] a State, * * * for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year * * *" (18 U.S.C.A. §3575).

Similarly, 18 U.S.C.A. §4251(d) and (f) preclude a federal offender from consideration for treatment under the National Addict Rehabilitation Act if that offender "has been convicted of a felony [classified as a felony by the law of the place where that offense was committed] on two or more prior occasions." That standard, similarly attacked as constituting a denial of equal protection of the law, appears to have been sustained by the United States Supreme Court. *Marshall* v. *United States, supra* (esp. dissenting opn., p. 430 n. 1).

mitted in the other jurisdiction would, if committed in New York, not be a felony. That potential result hardly offends the concept of equal protection where, as we shall demonstrate, the statutory classification is grounded in a "rational basis" [*Marshall* v. *United States, supra; McGinnis* v. *Royster,* 410 U.S. 263; *Dandrige* v. *Williams,* 397 U.S. 471; *McGowan* v. *Maryland,* 366 U.S. 420; *United States* v. *Craven,* 478 F. 2d 1329] and a proper administrative purpose. *Smith* v. *Follette,* 445 F. 2d 955, 959 (2d Cir. 1971); *Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70 (1913).

The statute in question has its origin in the recommendations of Model Penal Code §7.05 (1), American Bar Association's Standards, Sentencing Alternatives and Procedures §3.3 (b) (i), and New York's Persistent Felony Offender Statute, Penal Law §70.10, recommended by the New York State Commission on the Revision of the Penal Law. The Model Penal Code proffered the rational basis for the statute in question:

> "Many habitual offender statutes vary from * * * [the statute in question] in treating a foreign conviction as for a felony or misdemeanor depending on the gradation of the crime involved within the local jurisdiction, regardless of the manner of its treatment abroad. This is, however, difficult in application and, it seems to us, defective in logic since the seriousness of the crime ought to be judged by the prevailing norms in the jurisdiction where it was committed."

Critically, the Supreme Court has declared that the most objective criterion to determine the seriousness of an offense in any jurisdiction is the length of sentence. *Baldwin* v. *New York,* 399 U.S. 66 (1970); *Duncan* v.

Louisiana, 391 U.S. 145 (1965). New York consequently applied its minimum standard of the seriousness of a crime (*i.e.,* New York's definition of a felony—an authorized sentence in excess of one year) as the minimum standard to judge the seriousness of the violation of the prevailing norms in the other jurisdiction. New York thereby obtained an accurate barometer as to whether an individual was characteristically a serious criminal offender deserving of an extended term. It was thus the New York Legislature's reasoned judgment that it is the violation of an important prevailing norm in the other jurisdiction that identifies the serious criminal offender and calls for an extended term, not whether that violation may also be denominated as a felony in New York. The utilization on out-of-state convictions of the prevailing norms as expressed by sentence of these jurisdictions to identify serious offenders, provides the rational basis and relationship for which the statutory purpose of enhanced punishment is predicated.

In *People* v. *Olah,* 300 N.Y. 96 (1949), the New York Court of Appeals construed a former New York multiple felony offender statute (Penal Law of 1909, §1941) to require that the crime in the other jurisdiction must by definition be a felony under the laws of New York. Although petitioner does not cite *Olah,* the thrust of his equal protection argument is to be found in this case, since had the *Olah* standard been utilized here, petitioner would not be subjected to a second felony offender sentence. However, the *Olah* court rejected the argument that New York's then predicate multiple felony offender standard was of constitutional dimension when it stated that the Legislature "may amend the statute and make a defendant's second

* * * offender status depend upon some other criterion than the 'crime' of which he was convicted * * *'' *Id.* at 102.*

Further, the *Olah* rule resulted in a difficult, burdensome and time-consuming application of foreign statutes on an *ad hoc* basis to determine whether the local felony statute was akin to a New York felony statute. Both the American Bar Association and the drafters of the Model Penal Code, in recommending a sentence rather than a local felony standard, recognized such administrative and judicial pitfalls of the *Olah* standard (see A.B.A.'s Standards, *supra,* Commentaries, p. 169, Model Penal Code, *supra,* comment, p. 47). By adopting the American Bar Association and Model Penal Code's uniform classification based entirely on sentence and not local substantive crimes, the Legislature then decided to eschew the burdensome former law out of administrative and judicial necessity. And, where the statutory classification is based on administrative and judicial necessity, then, as here, equal protection is not violated. *Smith* v. *Follette, supra; Metropolis Theatre Co.* v. *City of Chicago, supra.*

United States v. *Bishop,* 469 F. 2d 1337 (1st Cir. 1969), petitioner's primary federal authority for invalidating New York's second felony offender statute is readily distinguishable. In *Bishop,* the statute under attack, 18 U.S.C. §4251 (d), (f), provided rehabilitative treatment for convicted narcotic addicts in certain cases. The statute excluded from consideration defendants who had two prior felony convictions. The statute did not provide a definition of

* New York has apparently reverted prospectively to the *Olah* standard. Laws of New York, 1975, ch. 784 §1, effective August 9, 1975.

felony but, rather, accepted any prior conviction which was labeled a felony in the jurisdiction. Further, the statute did not contain a time limit to exclude only felony convictions. By permitting a foreign jurisdiction to define felony for purposes of exclusion from beneficial treatment, the *Bishop* court concluded that Section 4251 created an egregious anomaly violative of equal protection where eligibility for the program was predicated on the fortuitous circumstances of being convicted in a jurisdiction where a criminal act was not a felony, in contrast to being convicted in another jurisdiction where the identical act was labeled a felony. Therefore, there was no rational basis for classification, nor were there relevant criteria to effectuate the purpose of the statute.

Penal Law §70.06 is quite different from 18 U.S.C. §4251 in purpose, operation and exclusion. As to purpose, where the federal act is concerned only with eligibility or exclusion for rehabilitative treatment, the state statute is concerned with providing an effective deterrent against prior serious offenders who seek to violate the law anew. In seeking to establish a uniform standard to determine who are prior serious offenders, New York concluded that sentence should be determinative criterion, as the Supreme Court has declared, for identifying serious offenders, since sentence is, as heretofore explained, the most accurate mechanism to judge seriousness. The employment of a single uniform sentencing standard in the New York statute as opposed to the resort to the "felony" label in the federal statute to determine whether a person is a second felony offender, is the cardinal difference between the two laws.

Finally, the *Bishop* court found Section 4251 wanting in not providing a time limit to exclude the use of old felony

convictions. By contrast, the New York statute excludes from consideration prior felonies where the defendant has been at liberty for a ten year period. Penal Law §70.06 (1)(b)(iv). This exclusionary time limit further underscores the rationality of the New York act as opposed to the federal act. Therefore, although *Bishop* seems applicable at first blush, the above analysis renders *Bishop* distinguishable. In addition, as noted by Judge Platt, *United States* v. *Marshall, supra,* has in effect overruled *Bishop. Neria* v. *United States,* 493 F.2d 913 (5th Cir. 1974).

In conclusion, since the classification based on a uniform, non-discretionary sentence standard had a rational basis, was not arbitrary and served a real administrative and judicial necessity, *i.e.,* to make enforcement of the act uniform, swift and certain, equal protection is not violated by making the length of sentence the determinative criterion on the definition of a prior felony.

Conclusion

The order of the District Court dismissing the petition for a writ of habeas corpus should be affirmed.

Respectfully submitted,

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October, 1976

Affidavit of Service by Mail #5569

In re:
United States of America, ex rel. Joseph A. Mercogliano
v County of Nassau

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on OCT 21 1976, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

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Att: Matthew Muraskin, Esq.
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Harry Minott

Sworn to before me this 21st
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Jack A. Messina

JACK A. MESSINA
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